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No.....

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IN THE

Supreme Court of the United States

October Term, 1982

MARIE FALCO,

Petitioner,

-against-

UNITED STATES OF AMERICA

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. May a person accused of perjury or other false statement offense be convicted consonant with the Constitution when the jury has rendered no decision on an essential element of the offense, i.e., materiality?

2. May a person accused of perjury or other false statement offense be convicted consonant with the Constitution without a finding beyond a reasonable doubt of an essential element of the offense, i.e., materiality?

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OPINIONS BELOW

The Order and opinion of the United States Court of Appeals for the Second Circuit is reprinted in the Appendix, infra, at 1a.

The United States District Court for the Southern District of New York entered no written order or opinion.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit, dated August 10, 1982, was entered on that date.

The Court of Appeals denied petitioner's request for a rehearing by order dated September 27, 1982.

The Court Of Appeals granted petitioner's motion for a stay of the mandate pending application for writ of certiorari by order dated October 12, 1982. The Court further granted petitioner a continuance of the stay until December 6, 1982, by order dated November 16, 1982.

Petitioner invokes the jurisdiction of the Supreme Court under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

A. Constitutional Provisions

Article III, §2, in relevant part:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury;***.

Amendment V, in relevant part:

No person shall *** be deprived of life, liberty or property, without due process of law;....

Amendment VI, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury***.

Statute

§ 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) Any indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if-

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Added Pub. L. 91-452, Title IV, § 401(a), Oct. 15, 1970, 84 Stat. 932, and amended Pub. L. 94-550, § 6, Oct. 18, 1976, 90 Stat. 2535.

STATEMENT OF THE CASE

Petitioner is a 35-year-old woman who was indicted and tried on several charges centering around a false document and allegedly perjurious testimony concerning that document given by petitioner at a trial in 1981.

More specifically, petitioner was indicted in June 1981 on two counts of making false declarations before a court (18 U.S.C. § 1623), one count of using a false document before a court (18 U.S.C. § 1623), and one count of conspiracy (18 U.S.C. § 371). Upon her arraignment, Miss Falco entered a plea of not guilty. She was tried before Judge Vincent L. Broderick, of the Southern District of New York, and a jury in December 1981. The jury returned a verdict of not guilty on the conspiracy count and the first count of making false declarations before

court, but a verdict of guilty on the second false declaration count and the false document charge.

In March 1982, petitioner was sentenced to three months in prison and three years probation, with a special requirement of community service to be rendered during the first two years of the probationary term.

Applying the existing Second Circuit rule, the trial court declined to permit petitioner to present either evidence or argument to the jury as to one element of the § 1623 offenses, i.e., the materiality of the false document and the false declarations in question. Petitioner's argument that neither the document nor the testimony were material within the meaning of § 1623 were substantial, and the evidence sought to be introduced was highly probative of the issue.

Nevertheless, due to the trial court's

ruling, the jury never passed on the issue of materiality before reaching its verdict, nor was the evidence ever tested against the reasonable doubt standard.*

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*No further discussion of the actual merits of petitioner's arguments in her case against the existence of materiality is provided herein, as the factual explanation necessary to those arguments is exceedingly complex and would add little, if anything, to the court's determination of the merits of this petition. Those arguments and explanations would, of course, form a part of petitioner's brief after grant of the writ.

Moreover, petitioner, in omitting a lengthy factual exposition here, relies as well on the doctrine that an unconstitutional jury instruction, or a failure to instruct the jury on the reasonable doubt standard, can never be harmless error. Jackson v. Virginia, 443 U.S. 307, 321 n. 14 (1979); Carpenters v. United States, 330 U.S. 395, 408-09 (1947). See also Glasser v. United States, 315 U.S. 60, 76 (1941)(When a right is absolutely fundamental, niceties of calculation as to harm are not to be indulged in.).

REASONS FOR GRANTING THE WRIT

I. Virtually All The Court's Rule 17 Criteria For Issuance Of The Writ Are Met With Respect to the Issues Petitioner Presents.

Many petitioners seeking the writ are able to show that they satisfy at least one of the usual criteria for its issuance, e.g., a split among the circuits. See Rule 17 of the Revised Rules of the Supreme Court. Few petitioners, however, bring to the Court a picture of such extensive disarray as exists in our national jurisprudence on the materiality question. As will be demonstrated below, the tug-of-war between recent Supreme Court decisions and the out-moded rule regarding materiality has led to so much conflict among the lower courts that not one, but three levels of conflict exist. This situation can only grow worse, leading to greater disorder in the law and

greater disparity in treatment of defendants across the country, unless the Supreme Court decides the issue and promulgates a definitive rule.

Moreover, the materiality issue affects prosecutions under scores of federal statutes and raises substantial questions as to rights under Article III, § 2 and under the Fifth and Sixth Amendments, all as more fully discussed, infra.

A. Petitioner's Case, And the Growing Number of Cases Like It, Present Issues Related to Federal Principles of Overriding Importance: A Criminal Defendant's Right To a Trial By Jury and Her Right to a Finding of Guilt Beyond A Reasonable Doubt.

Petitioner was indicted on two charges of having violated 18 U.S.C. § 1623, the federal perjury statute. Under that statute and the existing case law, the alleged false statements must be

shown to be both false and material before the defendant can be convicted. That is, materiality is universally regarded as an essential element of the offense.

A long line of Supreme Court cases over the last decades has held that the Constitution requires that such essential elements must be submitted to the jury for determination and that the jury must find that the element was proven beyond a reasonable doubt.

Nevertheless, in the Second Circuit, as in the majority of federal courts, the finding of the existence of materiality under 18 U.S.C. § 1623 is made by the court, rather than by the jury. Further, in the Second Circuit, materiality need not be found beyond a reasonable doubt, but the proof need only meet some lesser standard.

Petitioner believes and asserts that both of these practices violate constitutional imperatives of the gravest importance: the unassailable right to a jury trial and the right to the reasonable doubt standard. Both issues and the applicable Supreme Court rulings are discussed, infra, at II and III, respectively. The wide variety of federal statutes to which these issues are relevant is described, infra at 17-20.

B. The Circuit Courts, District Courts and State Courts Presently Resolve the Competing Claims Between Modern Constitutional Law and The Archaic Materiality Rule Differently.

1. A Conflict Exists Among the Federal Court of Appeals With Respect to False Statement Offenses.

Where the statute at issue in petitioner's case and other false statement

statutes* are concerned, the degree of deference paid to the Constitutional rights to a jury trial and the reasonable doubt standard differs radically from circuit to circuit. The Ninth and Eighth Circuits have submitted the materiality issue to the jury for the last several years. The applicable Ninth Circuit decisions include United States v. Halbert, 640 F.2d 1000 (9th Cir. 1980) (18 U.S.C. § 1341); United States v. Valdez, 594 F.2d 725 (9th Cir. 1979) (18 U.S.C. § 1001). Relevant decisions

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* The perjury statute at issue in petitioner's case may be lumped together with an impressive array of other federal laws penalizing false statements and misrepresentations. The acts prohibited by this group of statutes are referred to herein as the "false statement offenses"; they are discussed at 17-20 , infra.

in the Eighth Circuit include United States v. Voorhees, 593 F.2d 346 (8th Cir. 1979) (18 U.S.C. § 1001); and United States v. Johnson, 410 F.2d 38 (8th Cir.), cert. denied, 396 U.S. 822 (1969) (18 U.S.C. § 287).

Such treatment contrasts starkly with the rule in other circuits, where materiality is withheld from the jury and decided by the court, which often applies a vague standard, far less demanding than that of reasonable doubt. See, e.g.,United States v. Raineri, 670 F. 2d 702 (7th Cir. 1982) (18 U.S.C. § 1623); United States V. Berardi, supra; (18 U.SC. § 1623); United States v. Bell, 623 F.2d 1132 (5th Cir. 1980) (18 U.S.C. § 1623); United States v. Giacalone, 587 F.2d 5 (6th Cir. 1978) (18 U.S.C. §§ 1621, 1623); United States V. Kehoe,

562 F. 2d 65 (1st Cir. 1977); (18 U.S.C. § 1623); United States v. Paolicelli, 505 F.2d 971 (4th Cir. 1974) (18 U.S.C. § 1623).

Courts have tended to treat the element of materiality in the same manner no matter what false statement statute is involved. That is, courts which consider materiality a question for the jury in a perjury (§ 1623) prosecution, also submit it to the jury in other false statement trials. See, e.g., United States v. Halbert, supra (18 U.S.C. § 1341); United States v. Valdez, supra (18 U.S.C. § 1001); United States v. Voorhees, supra; United States v. Kostoff, 585 F. 2d 378 (9th Cir. 1978) (construing 18 U.S.C. § 1014); United States v. Johnson, supra (materiality submitted to jury in 18 U.S.C. § 287

prosecution).

By the same token, courts which have held that the materiality of an allegedly perjurious statement is a question for the court tend to reserve that question to the court in other false statement prosecutions as well. See, e.g., United States v. Schaffer, 600 F. 2d 1120, 1123 (5th Cir. 1979)

As a result of these differing approaches, two opposite rules now exist with respect to at least eight different false statement statutes, all of which should obviously be governed by a single rule--one acceptable in all courts and compatible with the Constitution.

2. The Conflict Exists Not Only Among the Circuit Courts, But Between District Courts Within the Same Circuit and Between Different Panels of the Same Circuit.

Although the rules petitioner challenges herein are old ones, the arguments against them are so compelling that the consensus among federal courts as to meteriality appears to have unravelled entirely. The result is an extraordinary situation in which different panels of a single circuit decide cases differently and a defendant before one district court judge may expect to be treated quite differently than a defendant facing the exact same charge in a courtroom next door.

The Eighth Circuit exhibits the greatest degree of schizophrenia on this question. In a single year, two decisions of that Circuit reached opposite conclusions as to materiality. See United States v. Phillips, 540 F.2d 319 (8th Cir.), cert. denied, 429 U.S. 1000 (1976) (materiality a question for the court in § 1623 prosecution) and United States v. Johnson, supra (materiality a question for the jury in § 287 prosecution). The trend represented by the Johnson court received further support in a 1979 opinion, in United States v. Voorhees, supra (approving submission to jury in 18 U.S.C. § 1001 trial). Yet, only a year later, a panel of the same court revealed that the issue was still unsettled, when one judge took the Johnson position while his two fellow jurists on the same bench disapproved that practice, averring that materiality

should be decided by the court. See United States v. Adler, 623 F.2d 1287, 1292 n.8 (8th Cir. 1980) (concerning a prosecution under both 18 U.S.C. § 287 and § 1001).

The Eighth Circuit anomaly is exceeded only by the chaos which now exists in the Second Circuit where petitioner was tried. There a split has arisen between district judges of the Southern Disctict of New York. Petitioner's request that the issue of materiality be submitted to the jury for determination beyond a reasonable doubt was denied in 1981. On her appeal, the Second Circuit reaffirmed the long-standing rule of the circuit and approved the denial. App.1a. Yet, only months after Petitioner Falco's request was denied, another judge within the same courthouse held that her employer was entitled to the benefit of the rea-

sonable doubt standard and to a jury determination of the materiality question. See United States v. Cunningham, 81 Cr. 458 (CLB) (Memorandum and Order of May 19, 1982 at 27). App. at 11a.

Such results are incongruous both to the individuals being tried and to the public at large; they are equally undesirable under our concept of a unitary federal jurisprudence. It has become clear, however, that such discrepancies among the courts will only multiply in number so long as this Court continues its present policy of abstaining from deciding the questions of law Petitioner now raises.

3. The Massachusetts State Court of Last Resort Has Decided This Issue Contrary to the Majority Rule In the Federal Courts of Appeals.

The highest court in the State of Massachusetts has carefully re-examined the majority rule on materiality and found it constitutionally wanting. In Commonwealth v. McDuffee, 398 N.E. 2d 463 (Mass. 1979), the court of last resort in that state re-examined the majority position and held that the rule could no longer stand up under either ordinary logical analysis nor under the Mullaney and Winship principle and their supervening constitutional dimensions, discussed at II and III, infra.

Massachusetts, then, provides a clear-cut example of a third layer of conflict in this area of law--a conflict between a state court of last resort and several of the federal courts of appeals, including the circuit in which that state is located. See United States v. Kehoe, 526 F.2d 65 (1st Cir. 1976)(reserving

materiality for decision by the court). See also Rule 17.1, subsection (b) (State court of last resort in conflict with federal court of appeals on a federal question).

C. A Substantial Federal Question Exists In Part Due to the Sheer Number of Offenses For Which Materiality is an Essential Element.

The perjury statute, by its very words, requires that a false statement have been material in order to be punishable. 18 U.S.C. § 1623.

Materiality is not a question limited to this single statute, however. Scores of federal statutes prohibit and penalize false statements, misrepresentations, false claims, and other forms of the seemingly infinite varieties of fraud which can be practiced upon federal agencies, courts, financial institutions

and others.*

Many of these statutes, like § 1623, explicitly require that the "false statement" or other misrepresentation be material. See, e.g., 18 U.S.C. § 1621 (perjury before grand jury); 18 U.S.C. § 922 (a) (6) (false statement in connection with firearms purchase); 26 U.S.C. § 7206 (1) (false statement on income tax return).

Apart from the literal terms of a given false statement statute, however, there is a discernible trend among federal courts of appeals to read an element of materiality into the offense,

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* More than twenty five provisions of the United States Code prohibit and punish such offenses, See Historical Note 18 U.S.C.A.§ 1621, p.620 (1966) Note also that the index of the United States Code Annotated lists a total of forty statutes under the "perjury or false swearing" heading. 6 U.S.C.A. General Index at 223-24 (1971).

whether the applicable statute requires it or not. See, e.g., United States v. Lichtenstein, 610 F.2d 1272, 1278 (5th Cir. 1980) (Courts have inferred a judge-made limitation of materiality as to all offenses punishable under 18 U.S.C. § 1001) ; United States v. Halbert, supra, 640 F.2d at 1007 ("The evolution of the federal law of fraud and false pretenses has been toward a requirement of materiality"). The courts construing many of these false statement offenses have recognized that materiality is an essential element. See, e.g., United States v. Halbert, supra, 640 F.2d at 1008; (materiality essential to mail fraud offense under 18 U.S.C. § 1341); United States v. Kostoff, 585 F.2d 378 (9th Cir. 1978) (essential to bank fraud offense, 18 U.S.C. § 1014); United States v. Adler, 623 F.2d 1287, 1291 n. 5 (8th Cir. 1980) (essential element of both 18 U.S.C.

§ 1001, governing false statements to government agencies generally, and 18 U.S.C. § 287, governing false claims to federal agencies); United States v. Talkington, 589 F.2d 415, 416 (9th Cir. 1978) (essential under 18 U.S.C. § 1001).

In summary, the false statement offenses tend to be treated alike insofar as the materiality question from one to the other is concerned. Because the various circuits handle the over-all issue so differently, viewed from a constitutional point of view, the questions petitioner raises herein have an importance far beyond her individual case and the statute under which she was convicted.

D. The Supreme Court Has Never Directly Passed On The Materiality Question; The Majority Rule Rests on a 1929 Dictum Which Cannot Be Justified Either Logically or Constitutionally.

The Supreme Court has never decided a case in which these issues presented here were squarely raised. See Rule 17.1, subsection (c). Supreme Court opinion on which the majority circuit courts all ultimately rest their present practice as to materiality is Sinclair v. United States, 279 U.S. 263 (1929). Sinclair concerned the question of a defendant's refusal to answer "pertinent" questions in a congressional committee hearing. In a brief two paragraphs, the Sinclair Court noted a similarity between the concepts of pertinency and materiality and stated that both should be decided by the court. Id. at 298-99.

An extended treatment of the logical arguments against the Sinclair Court's characterization of materiality as a "question of law for the court" must await a full appellate brief.

The Court is referred for present purposes, however, to the analyses provided in McDuffee v. Commonwealth, 398 N.E. 2d 463 (Mass. 1979) and People v. Clemente, 285 App. Div. 258, 262, 136, N.Y. 2d 202, 206 (1st Dept. 1954), aff'd, 309 N.Y. 890, 131 N.E. 2d 294 (1955).

Further, evidence that the characterization of materiality is not a question of law, either by its nature or of necesity, is provided by civil cases under federal law in which the jury determines the issue of materiality. See, e.g., Aquionics Acceptance Corporation v. Kollar, 563 F. 2d 712, 715 (6th Cir. 1976); Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876, 888 (2d Cir. 1972) (materiality issue submitted to jury in suit for securities fraud under 15 U.S.C. § 78;(b)).

Suffice it to say that no matter what the validity of the Sinclair dictum in its day, the progressive clarification of constitutional law since 1929 and the consequent disagreement among today's federal and state courts (exemplified by Jackson, Mullaney, Winship, Bloom, infra), mandates that the question should be taken up in detail and re-evaluated in the light of our modern understanding of a criminal defendant's constitutional rights. A brief discussion of the clash between the majority materiality rule and those constitutional rights will now be undertaken.

II. Defendants in Perjury And Other False Statement Prosecutions Are Denied Plenary Jury Trials Within The Meaning of the Constitution in the Majority of the Federal Courts of Appeals.

That petitioner, at her trial on perjury charges, and other defendants accused of false statement offenses,* are routinely denied the full benefit of a jury trial may be demonstrated by means of a simple syllogism.

Under the perjury statute, a false statement must be material in order to be punishable. 18 U.S.C. § 1623. The courts have therefore universally held that materiality is an essential element of this crime. See, e.g., United States v. Berardi, 629 F.2d 723, 728 (2d Cir.),

*As discussed, supra, a goodly number of federal statutes punish misrepresentations and other false statements. Materiality is a necessary element of virtually all such federal offenses.

cert. denied, 449 U.S. 995 (1980); United States v. Bell, 623 F.2d 1132, 1134 (5th Cir. 1980); United States v. Voorhees, 593 F.2d 346, 349 (8th Cir. 1979); United States v. Slawik, 548 F.2d 75, 79 (3d. Cir. 1977). See also Mullaney v. Wilbur, 421 U.S. 684, 702 (1975)(An element is any fact "critical to culpability"); In re Winship, 397 U.S. 358, 364 (1970)(An element of a crime is "any fact necessary to constitute the crime").

The Supreme Court rule as to the constitutional necessity of submitting to the jury each and every element of an offense could hardly be more clear. The jury trial principle has been emphasized repeatedly over the last decade and is stated most succinctly in Jackson v. Virginia:

> . . .[N]o person shall be made to suffer the onus of a criminal conviction

> except upon sufficient proof--defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

443 U.S. 307, 316 (1979)(emphasis added). See also In re Winship, 397 U.S. 358, 364 (1970)(Due Process Clause requires such proof of "every fact necessary to constitute the crime")(emphasis added).

The Supreme Court's edict that every element of a crime must be submitted to the trier of fact is clear and is stated without admitting of any exceptions. Nevertheless, the antiquated materiality rule of the majority of the Courts of Appeals leads to egregious violations of that decree. This is best illustrated by an opinion of the Second Circuit in which, on one and the same page, the court announced that "[materiality] is a necessary element of the crime of perjury," but that "[the jury] should be instructed that it

need not deliberate over this essential element of the offense." United States v. Berardi, 629 F.2d at 728. See also United States v. Raineri, supra; United v. Bell, supra; Unied States v. Giacalone, supra; United States v. Kehoe, supra; United States v. Paolicelli, supra (all holding that materiality is an element that need not be submitted to the jury).

Quite apart from the discrepancy between the Jackson language and the materiality rule,the error of that rule may also be laid bare by examining the raison d'etre of the jury trial. The Supreme Court has presented a searching discussion of the basic purpose of the jury trial in Baldwin v. New York, 399 U.S. 66 (1970). The Baldwin Court stated in the first instance that the constitutional allocation of power to the jury rather than to the court represents a "fundamental decision about the exercise

of official power." Id. at 72. Justice White went on the note that the Founding Fathers placed particular importance on jury trials to prevent the reality, or even the appearance, of misuse of power by the Government, whether through the executive or its co-ordinate branch, the judiciary:

> "[T]he primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or a panel of judges, but who at the same time are less likely to appear as but another arm of the Government that has proceeded against [her].

Id. See also id. at 76-77 (Burger, C.J., dissenting)("The Founding Fathers therefore cast the constitutional provisions we deal with here as limitations on federal power....").

As against the historical rationale for jury trials and the constitutional

cases cited above, little can be said to support the existing rule concerning materiality except that it has had a long life. The Supreme Court has made clear, however, that no amount of "weighty and ancient authority" can suffice to make an unconstitutional practice acceptable. Bloom v. Illinois, 391 U.S. 194, 196 n. 1, 198, 200 n. 2 (1968).

In Bloom, the Court reversed a practice more than two hundred and fifty years old by holding that contempt cases could no longer be determined by the court, but must be submitted to a jury.

In the course of the Bloom opinion, also, the Court referred briefly to the historical rationale for requiring a jury trial in criminal cases, i.e., "as a protection against the arbitrary exercise of official power." Id. at 202.

The Bloom Court, far from holding that historic usage excused the necessity

for a jury trial in contempt cases, stated instead that "an even more compelling argument" for the right to a jury trial could be made out as to contempt charges, because contemptuous conduct is "an interference with the judicial process" and represents an offense against the court itself. Id. at 202. These facts made exercise of the contempt power a particularly "arbitrary" one and therefore all the more "liable to abuse". Id. The necessity to "interpose the jury" between the accused and the accuser was thus paramount. Cf. Baldwin v. New York, supra, at 72.

The same "even more compelling arguments" are as true for perjury as they are for contempt cases, as perjury too is a crime that strikes at the heart of the judicial process. Indeed, at petitioner's sentencing hearing, the court before which her perjury case was tried remarked that it considered such charges extremely

serious, "because they go to the very nub of our whole system of justice." Transcript of Hearing, March 16, 1982, at 16.*

The Bloom decision serves as an excellent illustration of the governing precept that when historical practice and the Constitution collide, it is history which must yield.

Bloom serves equally to remind us of the need for periodic re-examination of allegedly unconstitutional practices in

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*The fact that perjury prosecutions often involve well-known political figures is a further reason to place determination of each element of that offense outside the reach of any branch of the government. Here, for example, the chain of indictments and trials that led to petitioner's trial began with a highly publicized investigation of Patrick Cunningham, petitioner's employer and then Chairman of the Democratic Party in New York State. Much better-known and far more controversial examples of political figures convicted of perjury include Earl Browder, former head of the American Communist Party, and Alger Hiss.

the light of latter-day developments in the constitutional case law. Petitioner has marshalled extremely powerful arguments for just such a re-evaluation here.

III. The Second Circuit Rule Concerning Materiality Violates the Winship Principle That the Reasonable Doubt Standard Must Be Applied to Every Element of a Criminal Offense

In In re Winship, the Supreme Court said:

> Lest there remain any doubt about the constitutional statute of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

397 U.S. 358, 364 (1970) (emphasis added).

The words "Lest there remain any doubt" would seem to admit of little question as to the depth of the Court's constitutional commitment to the reasonable doubt standard. This impression has been strengthened by the Court's unequivocal restatements of the Winship concept in subsequent cases. See Mullaney v.

Wilbur, supra (the government"must prove every ingredient of an offense beyond a reasonable doubt...."") (emphasis added). See also Patterson v. New York, 432 U.S. 197, 215 (1977) (affirming the Mullaney language).

The Second Circuit's rule on materiality, however, is explicitly to the contrary. Although recognizing that materiality is an essential element of any perjury offense, that Court has held that materiality "need not be established beyond a reasonable doubt". See, e.g., United States v. Berardi, 629 F.2d 723, 727 (2d Cir.), cert. denied, 449 U.S. 995 (1980. Accord, United States v. Giacalone, 587 F.2d 5, 7 (6th Cir. 1978), cert. denied, 445 U.S. 961 (1979)("The government need not prove materiality beyond a reasonable doubt".)

If the Constitution commands that the reasonable doubt standard be applied

in Winship-style juvenile delinquency proceedings, however, it is difficult indeed to see how it can--in even a limited way--constitutionally be denied a defendant in a felony trial for perjury.

The Second Circuit rule on materiality is, of course, unaccountable, illogical, and unconstitutional. Defendants accused of the crime of perjury, every bit as much as other citizens, need and are entitled to that reduction in the litigative "margin of error" which is provided by the reasonable doubt standard. See In re Winship, supra, 387 U.S. at 364. Due process requires no less, and due process is owed as much to those charged with perjury offenses as to those charged with kidnapping and homicide. See, e.g., Jackson v. Virginia, 443 U.S. 307, 323 (1979)("The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are

morally blameless."). See also United States v. Miranti, 253 F.2d 135, 141 (2d Cir. 1958)("[T]he Constitution is for the despicable as well as for the admirable.").

Petitioner here seeks nothing more than that the Due Process Clause be applied to her, just as it is to defendants charged with other--whether greater or lesser--crimes:

> ...The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.

Patterson v. New York, 432 U.S. 197, 210 (1977)(emphasis added).

CONCLUSION

The materiality rule, like the older, unconstitutional contempt procedure, rests on:

> an unconstitutional assumption of powers by the [courts] which no lapse of time or respectable array of opinion should make us hesitate to correct.

Bloom v. Illinois, supra, 391 U.S. at 198, quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

In keeping with Justice Holmes' uncompromising declaration, the Court should issue a writ of certiorari to the Second Circuit and make a fresh, binding determination of the questions petitioner raises. Nothing less will halt the continuing fragmentation and breakdown of the former consensus on the materiality rule; nor will anything short of a

Supreme Court decision put an end to the apparently unconstitutional procedures presently applied in felony trials for perjury and other false statements--this troubled area of our law.

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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Dated: New York, New York
November 24, 1982

APPENDIX

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 82-1104

v.

MARIE FALCO,

Defendant-Appellant.

----------x

This is an appeal from an order of the United States District Court for the Southern District of New York, entered after trial before Judge Vincent L. Broderick and a jury, convicting appellant Marie Falco of making false material declarations under oath at a trial and using a false document in the course of that testimony, 18 U.S.C. § 1623.

During 1978, appellant's employer, Patrick Cunningham, was the subject of an Internal Revenue Service investigation.

In order to support his tax reports, Cunningham persuaded his friend John Spain to tell the IRS agents that he had paid Cunningham $2,000 in cash during 1975 for legal services. Spain told this story to IRS agents on two separate occasions in 1978. In July 1980, Spain appeared before a Grand Jury that was investigating Cunningham and denied that he had made such a payment. Spain was charged with making a false statement to the Grand Jury about his previous interviews with IRS agents and tried for perjury in 1981. Appellant's indictment arose out of her testimony at the Spain trial.

Appellant was called by Spain's counsel to testify about a memorandum dated January 25, 1978, which detailed Spain's interview on that day with the IRS and stated that Spain informed the IRS that he never paid Cunningham cash.

Appellant testified that she typed the memorandum immediately after speaking to Spain on the telephone about his interview.

The Government cross-examined appellant extensively about the memorandum. Appellant insisted that it had been her responsibility to conduct debriefings, that she had remembered the memorandum and brought it to Spain's attention after the investigation focused on his perjury and that she was sure she typed the memorandum immediately after Spain called. The prosecuting attorney expressed disbelief that a professional typist prepared the memorandum, which contained numerous typographical errors. Other evidence tended to show that appellant did not work late on the night she claimed to have typed the memorandum. Appellant became quite emotional during the cross-examination.

At her trial for perjury, appellant admitted that the memorandum was false, but claimed that she had in fact typed a memorandum which was replaced by the fabrication without her knowledge. She introduced psychiatric testimony to show that her mental and emotional condition was such at the Spain trial that she was unable to distinguish the false document from the memorandum she had prepared.

Viewed in the light most favorable to the Government, drawing all rational inferences in favor of guilt, Glasser v. United States, 315 U.S. 60, 80 (1942), the evidence at appellant's trial was sufficient to show that she intentionally made a material false statement under oath at Spain's trial. The jury was entitled to evaluate the credibility of the psychiatric witnesses and reject their opinion that appellant was unaware that her testimony was false.

See United States v. Singh, 628 F.2d 758, 766 (2d Cir.), cert. denied, 449 U.S. 1034 (1980). A rational trier of fact could reasonably have found that appellant had the specific intent to commit perjury.

Appellant's claim that the trial judge erred in denying her request to submit the materiality issue to the jury is without merit. This Court has consistently held that materiality is a threshold question to be decided by the court. United States v. Berardi, 629 F.2d 723, 728 (2d Cir.), cert. denied, 449 U.S. 995 (1980); United States v. Mulligan, 573 F.2d 775, 779 (2d Cir.), cert. denied, 439 U.S. 827 (1978). Furthermore appellant's false statements were unquestionably relevant to whether Spain testified falsely to the Grand Jury.

Appellant's motion for a new trial on the basis of newly discovered evidence was properly denied because appellant failed to show either that evidence of a telephone conversation log kept at Cunningham's office would probably lead to acquittal, United States v. Gilbert, 668 F.2d 94, 96 (2d Cir. 1981), cert. denied,102 S. Ct. 2014 (1982), or that the evidence could not have with due diligence been discovered at or before trial. United States v. Natelli, 553 F.2d 5, 7 (2d Cir.), cert denied, 434 U.S. 819 (1977). The record proffered as newly-discovered evidence simply did not corroborate appellant's statement that she spoke to John Spain on January 25, 1978.

Inasmuch as appellant was not asserting an insanity defense, the court was not required to instruct the jury that the Government must disprove evidence

of appellant's deficient mental condition. Psychiatric testimony was offered by appellant to negate the intent element of the offense, and the jury was adequately instructed that the Government bore the burden of proving intent beyond a reasonable doubt.

Decisions on the admissibility of evidence are vested in the trial court and should not be disturbed absent an abuse of discretion. United States v. Robinson, 560 F.2d 507, 515 (2d Cir.) cert. denied, 435 U.S. 905 (1977). Because statements made by a defendant about her mental state may be unreliable when made in anticipation of litigation, the trial court did not err in admitting statements made by appellant to her testifying psychiatrists for the limited purpose of assessing the expert witnesses' credibility.

Finally, appellant has not shown that the district court judge relied on material misinformation or constitutionally impermissible factors in setting sentence. Accordingly, the sentence which concededly is within the statutory limit is not subject to appellate review. United States v. Mejias, 552 F.2d 435, 447 (2d Cir.), cert. denied, 434 U.S. 847 (1977).

The judgment is affirmed.

Hon. Ellsworth A. Van Graafeiland

Hon. Lawrence W. Pierce

Hon. Howard T. Markey

ENTERED: August 10, 1982

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 27th day of September, one thousand nine hundred and eighty-two.

----------x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 81-1104

MARIE FALCO,

Defendant-Appellant.

----------x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Marie Falco,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for hearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by:

_____

Francis X. Gindhart
Chief Deputy Clerk

Entered: September 27, 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	81 Cr. 458-CLB
-v-	(Excerpts From)
PATRICK J. CUNNINGHAM and JOHN J. SWEENEY,	Memorandum And Order
Defendants.	

(Excerpt from pp. 26-27:)

By this motion, Sweeney urges this Court to determine the materiality of these alleged false declarations at this pre-trial stage, or in the alternative, to determine whether this issue should be submitted as one of fact to the jury for resolution.

It is undisputed that the burden of proof is upon the Government to establish the following four elements with respect to Counts VIII, IX and X: (1) that Sweeney took an oath to testify truthfully before a United States grand jury

in this district; (2) that he then made false statements as to matters about which he testified under oath as are charged in the Indictment; (3) that those false statements were wilfully made in that he knew them to be false when made; and (4) as to the matters which were allegedly false, that such were material to the issues under inquiry by the grand jury. See United States v. Mulligan, 573 F.2d 775, 779 (2d Cir.), cert. denied, 439 U.S. 827 (1978).

The Government urges, however, that the necessary element of materiality within the offense charged in 18 U.S.C. §1623 is a question of law to be determined by court, and also that it need not be proved beyond a reasonable doubt. Relying upon United States v. Berardi, 629, F.2d 723, 728 (2d Cir.), cert. denied, 445 U.S. 995 (1980) and Mulligan, supra, the Government asserts that its proof at

trial will satisfy this lesser standard and establish the materiality of the alleged false declarations charged in Counts VIII, IX and X.

The difficulty presented by the Government's contention is that it controverts the fundamental right accorded criminal defendants that no person shall lose his liberty unless the Government has "persuad[ed] the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt". In re Winship, 397 U.S. 358, 364 (1969). It was held in Patterson v. New York, 432 U.S. 197, 210 (1976), that:

> "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." (emphasis added)

This Constitutional requirement was reiterated in Sandstrom v. Montana, 442 U.S. 510, 520 (1978).

Materiality is an essential element of the crime charged in 18 U.S.C. § 1623. Accordingly, materiality must be established by the Government to the satisfaction of the trial jury beyond a reasonable doubt. We believe that the Government's reliance upon Berardi and Mulligan, which may be read to suggest otherwise, is misplaced.

At the trial of this Indictment, the Court will present the materiality vel non of the alleged false declarations to the jury as an essential element of the offenses charged to be regarded as a disputed issue of fact subject to the jury's determination beyond a reasonable doubt before a conviction may be had.

* * *

Office - Supreme Court, U.S.
FILED
NOV 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-662

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARIE FALCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court was required to submit the question of materiality to the jury in a prosecution of petitioner for making a false material statement in violation of 18 U.S.C. (& Supp. V) 1623.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-882

MARIE FALCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1982. A petition for rehearing was denied on September 27, 1982 (Pet. App. 9a-10a). The petition for a writ of certiorari was filed on November 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. (& Supp. V) 1623(a) provides in pertinent part:

> Whoever under oath * * * in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration

or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

1. Petitioner was indicted on one count of conspiring to commit perjury, in violation of 18 U.S.C. 371 (Count 1); two counts of committing perjury at a criminal trial, in violation of 18 U.S.C. 1623 (Counts 2 and 3); and one count of using a false document in the course of her testimony at a criminal trial in violation of 18 U.S.C. 1623 (Count 4). Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on Counts 2 and 4 and acquitted on Counts 1 and 3. She was sentenced to concurrent terms of 18 months' imprisonment, with all but three months suspended, to be followed by three years' probation. She was also ordered to devote 300 hours to community service during each of the first two years of her probationary term.

2. The evidence showed (Pet. App. 1a-4a) that petitioner was the secretary to Patrick Cunningham, a New York State political leader. During 1978, the Internal Revenue Service was investigating the sources of certain income Cunningham had reported. In order to support his tax reports, Cunningham persuaded a friend, John Spain, to tell the IRS investigators that in 1975 he had paid Cunningham $2,000 in cash for legal services. Spain made such statements to IRS investigators on two occasions during 1978. In July 1980, Spain testified before a grand jury investigating Cunningham for possible violations of tax laws. In the course of his grand jury testimony, Spain denied that he had made cash payments to Cunningham and further denied that he had told the IRS investigators

that he had made such payments. Spain was subsequently indicted for making false statements to the grand jury about what he had told the IRS investigators.

Spain's principal defense to the perjury charges was that by the time he testified before the grand jury he had forgotten what he had told the IRS investigators and thus did not knowingly give false testimony. At his trial, Spain called petitioner to testify concerning a memorandum dated January 25, 1978, which purportedly described Spain's interview with the IRS investigators on that date. The memorandum stated that Spain had told the IRS investigators that he had never paid Cunningham any cash. Petitioner testified that she had typed the memorandum immediately after receiving a telephone call from Spain concerning his interview with the IRS investigators. On cross-examination she insisted that she had typed the memorandum herself, in spite of the fact that the memorandum contained numerous typographical errors and in the face of evidence showing that she had not worked late on the night in question. On the basis of petitioner's testimony, the memorandum was received in evidence at Spain's trial. Nevertheless, Spain was convicted.

Based on her testimony concerning the memorandum, petitioner was indicted in the instant case for making false material declarations under oath and using a false document in a proceeding before a court of the United States, in violation of 18 U.S.C. 1623. At her trial petitioner admitted that the memorandum she had authenticated at Spain's trial was false, but she claimed that her mental and emotional condition at the Spain trial had rendered her unable to distinguish between the false memorandum and one she had actually prepared. The trial court denied petitioner's request to present evidence concerning the materiality of her prior testimony and to argue the question of materiality to the jury.

3. The court of appeals affirmed (Pet. App. 1a-8a). It rejected petitioner's argument that the trial court erred in refusing to submit the issue of materiality to the jury. The court of appeals noted that it had consistently held that materiality is a threshold question to be decided by the court and that, in any event, petitioner's false statements were "unquestionably relevant to whether Spain testified falsely to the Grand Jury" (*id.* at 5a).[1]

ARGUMENT

Petitioner contends that the trial court erred in not submitting to the jury the question of the materiality of her false statements to the issue at Spain's trial of whether Spain testified falsely before the grand jury. She acknowledges (Pet. 21) that this Court has stated that the materiality of false testimony charged as perjury is a question of law to be decided by the court rather than the jury. See *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929). Petitioner contends, however, that the rule articulated in *Sinclair* is no longer viable; in particular, she argues (Pet. 20-36) that the materiality of a false statement alleged to constitute a violation of 18 U.S.C. (& Supp. V) 1623[2] is an essential element of the crime and that a jury therefore must find materiality beyond a reasonable doubt. Petitioner's contentions are without merit and do not warrant further review.

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[1]The court of appeals concluded also (Pet. App. 4a-8a) that the evidence was sufficient to support petitioner's conviction, that petitioner's motion for a new trial on the basis of newly discovered evidence was properly denied, that the jury instructions were adequate, that the trial court did not err in admitting certain evidence, and that the trial court did not rely on material misinformation or constitutionally impermissible factors in setting petitioner's sentence. Those holdings are not at issue here.

[2]Although petitioner refers to a variety of statutes, only 18 U.S.C. (& Supp. V) 1623 is at issue in her case.

1. *Sinclair* involved a challenge to a conviction under 2 U.S.C. 192, which imposes a penalty on any witness before a committee of Congress who refuses to answer "any question pertinent to the question under inquiry" by the committee. The Court rejected Sinclair's claim that the question he had refused to answer was not pertinent to any inquiry the committee was authorized to make. 279 U.S. at 296-298. The Court went on to hold that the question of pertinency had been "rightly decided by the court as one of law." *Id.* at 298. The Court observed that the question of pertinency was "not essentially different from the question as to materiality of false testimony charged as perjury in prosecution for that crime. * * * [T]he materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court." *Ibid.* (citations omitted). The Court also noted that questions of pertinency were similar to those concerning relevancy of evidence, which were clearly matters of law to be decided by the court. The Court concluded that the reasons for holding relevancy and materiality to be questions of law applied with equal force to the determination of pertinency and that it would be "incongruous and contrary to well-established principles to leave the determination of such a matter to a jury." *Id.* at 299 (citations omitted).

In concluding that materiality in the context of a perjury prosecution is a matter of law to be decided by the court rather than the jury, the Court in *Sinclair* articulated a principle of long standing in both federal and state courts. See, *e.g.*, Annot., 62 A.L.R. 2d 1027 (1958) (citing numerous federal and state cases); Annot., 22 A.L.R. Fed. 379, 387-389 (1975) (citing cases brought under 18 U.S.C. 1621 and 1622). Contrary to petitioner's suggestion, that rule continues to be a viable one. This Court has not retreated from its statements in *Sinclair*. In *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962), the Court cited as a basic

proposition its holding in *Sinclair* that pertinency under 2 U.S.C. 192 is a question to be determined by the court as a matter of law. The traditional rule with respect to materiality in a perjury prosecution continues to be followed in the federal courts and in the majority of state courts. See, *e.g.*, *United States* v. *Watson*, 623 F.2d 1198, 1201 (7th Cir. 1980) (describing rule as "well settled" in a case brought under 18 U.S.C. (& Supp. V) 1623); *United States* v. *Richardson*, 596 F.2d 157, 165 (6th Cir. 1979) (characterizing rule as "long settled" in a case brought under 18 U.S.C. (& Supp. V) 1623). As this Court noted in *Sinclair*, that rule is justified in view of the similarity between the issues of materiality in a perjury prosecution and relevancy of evidence for purposes of admissibility in any legal proceeding, a matter that is decided by the court under our legal system.[3] The legislative history of 18 U.S.C. (& Supp. V) 1623 does not indicate that Congress intended to abandon the traditional rule in prosecutions under that statute. See *United States* v. *Watson, supra*, 623 F.2d at 1201 n.6. Petitioner herself does not present "logical arguments" against the rule articulated in *Sinclair* and numerous other cases, but states only that such arguments "must await a full appellate brief" (Pet. 21).

Petitioner contends that various constitutional cases decided by this Court require abandonment of the traditional rule that materiality is a question of law to be decided by the court in perjury cases. But the cases she cites do not dictate such a result. Both *Bloom* v. *Illinois*, 391 U.S. 194 (1968), and *Baldwin* v. *New York*, 399 U.S. 66 (1970), hold

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[3]Materiality may be a question of fact in some types of proceedings, such as prosecutions under certain fraud statutes. See pages 7-8 note 5, *infra*. However, in the context of a perjury prosecution, in which the question is the materiality of a false statement or document to an issue in a legal proceeding, materiality normally is a matter of law.

that a defendant is entitled to a jury trial in certain types of cases involving exposure to a substantial term of imprisonment. Neither decision suggests that a jury should decide questions of law as well as questions of fact. Here petitioner had a jury trial in which the jury decided all controverted factual issues. Thus, there was no violation of the principles stated in *Bloom* and *Baldwin*. Petitioner also cites *In re Winship*, 397 U.S. 358 (1970), and *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), in which the Court made clear that the prosecution is required to prove beyond a reasonable doubt "every fact necessary to constitute the crime" charged (397 U.S. at 364). As the language of *Winship* suggests, the "beyond a reasonable doubt" standard applies to questions of fact; it simply does not apply to, or even have any real meaning in connection with, questions of law.[4]

2. Petitioner contends (Pet. 7-12) that there is a conflict among the circuits with respect to whether materiality is a question of law to be decided by the court. The cases that petitioner cites do not necessarily indicate a conflict;[5] in any

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[4]Petitioner also cites the statement of the Court in *Jackson* v. *Virginia*, 443 U.S. 307, 316 (1979), that there must be "evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." That statement is simply a description of the holding in *Winship*, which on its face relates to issues of fact, rather than issues of law. See also *Patterson* v. *New York*, 432 U.S. 197, 210 (1977) (characterizing prior decisions).

[5]The cases petitioner cites as rejecting the *Sinclair* rule involve statutes other than 18 U.S.C. (& Supp. V) 1623 and in some instances do not address directly the question whether materiality is a matter of law. See, *e.g.*, *United States* v. *Halbert*, 640 F.2d 1000, 1007-1008 (9th Cir. 1981) (concluding that the failure to instruct the jury on materiality in a mail fraud prosecution under 18 U.S.C. 1341 and 1342 was harmless error, since the materiality of the misrepresentations was clearly established by the evidence); *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979) (concluding that materiality should have been submitted to the jury in a prosecution under 18 U.S.C. 1001, but that failure to do so was not reversible error because the materiality of the false statements

event, it is clear that no conflict exists with respect to the determination of materiality under 18 U.S.C. (& Supp. V) 1623, the statute petitioner was charged with violating. Although petitioner cites the Eighth and Ninth Circuits as having rejected the traditional rule (Pet. 8), both circuits have held that in cases brought under 18 U.S.C. (& Supp. V) 1623 materiality is a question of law to be decided by the court. See *United States* v. *Ostertag*, 671 F.2d 262, 265 (8th Cir. 1982); *United States* v. *Kekich*, 590 F.2d 750, 752 n.3 (8th Cir. 1979); *United States* v. *Dipp*, 581 F.2d 1323, 1328 (9th Cir. 1978), cert. denied, 439 U.S. 1071 (1979); *United States* v. *Percell*, 526 F.2d 189, 190 (9th Cir. 1975). These decisions accord with the decisions of the First, Second, Fourth, Fifth, Sixth and Seventh Circuits, cited by

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at issue was so clearly established); *United States* v. *Kostoff*, 585 F.2d 378, 380 (9th Cir. 1978) (failure to instruct jury on materiality in mail fraud prosecution was not error because materiality was clearly established from the evidence); *United States* v. *Voorhees*, 593 F.2d 346, 349 (8th Cir.), cert. denied, 441 U.S. 936 (1979) (concluding that the jury had been properly instructed on the issue of materiality in a prosecution under 18 U.S.C. 1001); *Johnson* v. *United States*, 410 F.2d 38, 46 (8th Cir.), cert. denied, 396 U.S. 822 (1969) (stating that questions of materiality are for the trial court in a prosecution under 18 U.S.C. 287, but indicating that the issue of materiality in fact had been submitted to the jury). None of these cases refers to *Sinclair*.

The statutes at issue in these cases, as well as those in the civil cases petitioner cites (Pet. 22), address fraud as well as perjury. The question of materiality in a fraud-type case is often the factual tendency of the alleged action or statement to induce action by the government or by an investor, which is different from the legal question of materiality of testimony in a legal proceeding. See *United States* v. *Adler*, 623 F.2d 1287, 1292 n.8 (8th Cir. 1980).

petitioner (Pet. 9-10). Thus, there is no conflict that requires the attention of this Court.[6]

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[6]Petitioner also contends (Pet. 13-15) that conflict exists among cases within the Eighth Circuit and among district courts within the Second Circuit. Assuming such conflicts exist, they are not matters that call for the attention of this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

Petitioner argues that the Court should resolve a conflict between state and federal courts concerning whether materiality is a matter of law. She cites *Commonwealth* v. *McDuffee*, 379 Mass. 353, 398 N.E. 2d 463 (1979), in which the Supreme Judicial Court of Massachusetts held that the element of materiality under a state perjury statute was a matter for the jury rather than for the court. See also *People* v. *Clemente*, 285 A.D. 258, 262, 136 N.Y.S.2d 202, 206 (1954), aff'd, 309 N.Y. 890, 131 N.E. 2d 294 (1955) (construing New York perjury statute as requiring submission of materiality to jury). Of course, *McDuffee* did not address materiality under 18 U.S.C. (& Supp. V) 1623. In addition, *McDuffee* involved a false statement made to a government agency in a license renewal proceeding, not perjury committed during a trial or grand jury proceeding. Thus, it may be closer to a fraud-type case. See note 5, *supra*. *McDuffee* represents a minority view among the states. See *State* v. *Gallegos*, 98 N.M. 31, 644 P.2d 545, 546 (Ct.App. 1982) (noting that all federal courts follow the traditional rule and that New York and Massachusetts are the only states that hold that materiality is a jury question in a perjury case). Because the issue is essentially statutory, and state courts do not try prosecutions brought under 18 U.S.C. (& Supp. V) 1623, there can be no conflict requiring resolution by this Court.

Even if petitioner were correct in her contention that it would be advisable to reconsider the well established rule that materiality is a question of law to be decided by the court in the context of a perjury prosecution, this case would not be an appropriate vehicle for such reconsideration, since submission of materiality to the jury could not conceivably have affected the outcome of her trial. As the court of appeals stated (Pet. App. 5a), petitioner's false statements concerning the memorandum she allegedly had typed "were unquestionably relevant to whether Spain testified falsely to the Grand Jury." Nor is there any factual dispute concerning the content of petitioner's testimony at Spain's trial or the issues at that trial.

Petitioner does not argue the merits of her contention that her testimony was not material (Pet. 3 n.*), on the ground that "the factual explanation necessary to those arguments is exceedingly complex

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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• • •." In view of the obvious materiality of petitioner's trial testimony to the truthfulness of Spain's grand jury testimony, it is difficult to imagine what factual explanation, simple or complex, could possibly refute the court's conclusion.